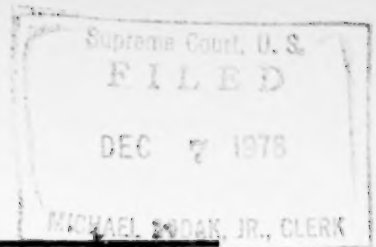


No. 78-633



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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LOCAL 102, INTERNATIONAL LADIES' GARMENT  
WORKERS' UNION, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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WADE H. McCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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Petitioner, a labor union local, contends that a district court order directing its attorneys to testify before a grand jury about conversations one of them had with petitioner's controlling officer violated the attorney-client privilege.

1. On May 8, 1978, a special grand jury was impaneled in the United States District Court for the Eastern District of New York to investigate a bribe offer made to the president of Local 20408 of the United Warehouse, Industrial and Affiliate Trades Employees Union. The purpose of the offer was to induce him to withdraw his union's petition seeking recognition from the NLRB as the collective bargaining agent for certain employees of Interstate Dress Carriers, Inc., and for production and maintenance employees employed at the Jersey City location of G&S Temporary Service, Inc. and G.S.

Supply Associates, Inc. The grand jury sought, among other things, to determine if officials of petitioner Local 102, which was operating under a collective bargaining agreement with Interstate, were involved in the bribe offer. Among those called to testify were David Crystal and Allen Breslow, attorneys for Local 102. Invoking the attorney-client privilege on behalf of his client, Crystal refused to disclose the details of two telephone conversations he had with Sidney Gerstein, manager and controlling officer of Local 102. Additionally, both Crystal and Breslow declined to divulge the substance of a brief conversation with each other. On July 14, 1978, the government moved to compel Crystal and Breslow to disclose the conversations. The district court granted the motion in an oral opinion (Pet. App. 1a-8a), and the court of appeals affirmed (Pet. App. 9a-11a).<sup>1</sup> On September 5, 1978, after Justices Powell and Brennan denied Local 102's motion for a stay pending application for a writ of certiorari, both attorneys testified before the grand jury as to the substance of the conversations. Local 102 and Gerstein, among others, were subsequently indicted for obstructing proceedings before the NLRB and conspiring to commit that offense, in violation of 18 U.S.C. 1505 and 371.

In support of its motion to compel the testimony, the government offered uncontradicted evidence that on April 12, 1978, Anthony DiLapi, an organizer for Teamster's Local 522, told Mathew Eason, president of Local 20408, that if the NLRB petition were withdrawn, Eason would be paid a sum of money and permitted to name certain

<sup>1</sup>Breslow and Crystal also appealed from the order, but their appeals were dismissed for lack of jurisdiction. *United States v. Ryan*, 402 U.S. 530 (1971). The court of appeals found that it had jurisdiction over Local 102's appeal because Local 102 was an intervenor claiming a privilege as to the testimony of a third party. See *Perlman v. United States*, 247 U.S. 7 (1918); *In re Grand Jury Proceedings*, 563 F. 2d 577, 580 (3d Cir. 1977) (Pet. App. 10a).

men whom DiLapi would arrange to have admitted into Local 102 (J.A. 8).<sup>2</sup> DiLapi and Benjamin Ladmer, an officer of Local 300 of the International Production Service and Sales Employees Union, subsequently offered Eason \$3,500 to withdraw the petition (J.A. 14). They also warned that if he refused to cooperate, G&S Temporary Service, Inc., whose Jersey City maintenance employees Local 20408 was also seeking to represent, would go out of business, reopen under another name, and refuse to rehire the former employees (J.A. 14, 112-113).<sup>3</sup> On April 27, 1978, Sidney Lieberman, vice president of Interstate, increased the bribe offer to \$5,000 and actually paid Eason \$2,000. He also agreed to arrange with Gerstein to have Fred Lawson and ten other men of Eason's choice admitted into Local 102 in consideration for withdrawal of the petition (J.A. 8, 14). The next day Gerstein directed Lawson's admission into the union (J.A. 8). Eason thereafter furnished ten additional names to Lieberman's secretary, and Gerstein immediately dictated a memorandum directing their admission into the union (J.A. 9, 16).

The day before the NLRB hearing, Gerstein had a telephone conversation with Crystal that included discussion of the withdrawal of the petition. After Crystal spoke briefly with Breslow about the anticipated withdrawal of the petition, he again conferred with Gerstein on the subject (J.A. 10, 62, 120-121). At the NLRB hearing, Breslow told the hearing examiner that the petition might be withdrawn (J.A. 11).

<sup>2</sup>"J.A." refers to the Joint Appendix filed in the court of appeals.

<sup>3</sup>The government advised the district court that its investigations showed that G&S Temporary Service, Inc., one of the three employers named in the representation petition filed with the NLRB by Local 20848 (J.A. 54), furnished non-union employees to Interstate, which employed them as "temporary" workers at less than union scale (J.A. 112).

2. The order that Local 102 attacks in this case is the district court's order directing attorneys Breslow and Crystal to testify before the grand jury concerning the conversations at issue. Because, as noted above (page 2), the attorneys have now testified before the grand jury as to those conversations, the case is moot and certiorari should therefore be denied for lack of jurisdiction. See *Barney v. United States*, 568 F. 2d 116, 117 (8th Cir. 1978); *Kurshan v. Riley*, 484 F. 2d 952 (4th Cir. 1973); *Vesco v. SEC*, 462 F. 2d 1350, 1351-1352 (3d Cir. 1972).<sup>4</sup>

3. In any event, there is no merit to Local 102's claim. The challenged conversations were not protected by the attorney-client privilege. As the courts below recognized, the privilege does not extend to conversations relating to ongoing criminal activity. *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F. 2d 899, 901 (2d Cir. 1977); *United States v. Friedman*, 445 F. 2d 1076, 1086 (9th Cir.), cert. denied, 404 U.S. 958 (1971). To defeat the privilege the government need not establish the existence

<sup>4</sup>There is, however, no reason for this Court to vacate the judgment of the court of appeals. As we show below, Local 102's claim would not merit review even in the absence of a suggestion of mootness. This case is thus unlike those that become moot after a grant of certiorari, thereby depriving this Court of jurisdiction to decide a legal issue thought worthy of review. See, e.g., *Weinstein v. Bradford*, 423 U.S. 147 (1975). Similarly the rule applicable to cases that become moot while on appeal is inapposite here, since in such instances the appellant has been deprived of his statutory right to an appellate resolution of the controversy. See *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). By contrast, "[a] review on writ of certiorari is not a matter of right \* \* \*." Sup. Ct. R. 19(1). (These points are explored at greater length in our opposition to the petition in *Velsicol Chemical Corp. v. United States*, No. 77-900, cert. denied, 435 U.S. 942 (1978), a copy of which we are sending to Local 102.) In any event, if Breslow, Crystal, or both of them testify at the trial of the charges stated in the indictment filed against Local 102 and others (page 2, *supra*), Local 102 can reassert its claim of privilege and present that claim anew to this Court if it is convicted and the conviction affirmed.

of ongoing criminal activity beyond a reasonable doubt; there need only be " 'something to give colour to the charge [of illegality], ' " that is, " 'prima facie evidence that it has some foundation in fact.' " *Clark v. United States*, *supra*, 289 U.S. at 15, quoting from *O'Rourke v. Darbishire*, [1920] A.C. 581, 604. See also *United States v. Friedman*, *supra*, 445 F. 2d at 1086; *United States v. Bob*, 106 F. 2d 37, 40 (2d Cir.), cert. denied, 308 U.S. 589 (1939).

The government's uncontradicted evidence in this case showed that the conspiracy to secure withdrawal of the NLRB petition included an agreement to admit Fred Lawson and ten other men into Local 102. After Eason gave Lawson's name to Lieberman, Gerstein directed Lawson's admission. Immediately after Eason furnished Lieberman's secretary with ten additional names, Gerstein personally dictated a memorandum directing their admission. The government also showed that the conversation between Gerstein and Crystal the day before the NLRB hearing related to the withdrawal of the petition and that Breslow indicated to the hearing examiner the following day that he understood the petition would be withdrawn. It is reasonable to conclude that Gerstein learned of the withdrawal from one of the other conspirators and that such non-public information would not have been conveyed to him unless he were a party to the conspiracy. Moreover, Gerstein clearly stood to gain from the conspiracy, since, as the district court noted (Pet. App. 5a), "the withdrawal of Local 20408's organizing petition would have, in the least, stabilized Local 102's position, and, consequentially, enhance the posture of the man who exercised a considerable degree of effective control over 102."<sup>5</sup> These facts, as the courts

<sup>5</sup>The attorney need not himself be aware of the illegality to defeat the attorney-client privilege. *Clark v. United States*, *supra*, 289 U.S. at 15; *United States v. Friedman*, *supra*, 445 F. 2d at 1086.

below found, clearly permit the inference that the challenged communications related to an ongoing conspiracy.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

DECEMBER 1978